

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Applications of	)	
	)	
GAP Cellular, L.C.	)	
	)	
For Phase II Unserved Areas,	)	
Market No. 352(B), Colorado 5 - Elbert RSA	)	File Nos. 02600-CL-CP-95
Station KNKR202	)	02602-CL-CP-95
	)	02614-CL-CP-95
	)	
Market No. 526(B), Montana 4 - Daniels RSA	)	02609-CL-CP-95
Station KNKR201	)	

**ORDER**

**Adopted: March 2, 2000**

**Released: March 3, 2000**

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this Order, we address the following: a) the Petition for Reconsideration filed by Smoky Hill Cellular of Colorado Limited Partnership (Smoky Hill) on May 1, 1995 (Smoky Hill Petition) regarding the Commission's grant of the three above-captioned applications filed by GAP Cellular, L.C. (GAP) in the Colorado 5-Elbert RSA (Elbert RSA); and b) the Petition for Reconsideration filed by Badlands Cellular of North Dakota Limited Partnership (Badlands Cellular) on May 1, 1995 (Badlands Cellular Petition) regarding the Commission's grant of GAP's above-captioned application in the Montana 4-Daniels RSA (Daniels RSA) (collectively, Petitions). For the reasons discussed below, we dismiss the Petitions as procedurally defective.

**II. BACKGROUND**

2. On December 30, 1994, GAP filed three Phase II unserved area applications for authority to construct and operate a cellular system in the Daniels RSA, and on December 31, 1994, GAP filed a single Phase II unserved area application for operation in the Elbert RSA (collectively, the GAP Applications). The Commission accepted the GAP applications for filing on February 10, 1995.<sup>1</sup> No petitions to deny were filed and the Commission granted the GAP Applications on March 31, 1995.<sup>2</sup> On May 1, 1995, Smoky Hill, the incumbent cellular licensee for the Elbert RSA, and Badlands Cellular, the incumbent cellular licensee for the Daniels RSA (collectively, Petitioners), filed separate petitions for reconsideration requesting the set-aside of the GAP Applications. Petitioners allege that GAP's proposed facilities will result in overlaps with Petitioners' existing cellular geographic service areas (CGSAs), in violation of Commission rule sections 22.99, 22.911(d), 22.911(e), 22.912(d) and 22.949(b).<sup>3</sup> In its Oppositions, GAP contends that the Petitions

<sup>1</sup> See *Public Notice*, Report No. CL-95-67 (rel. Feb. 10, 1995).

<sup>2</sup> See *Public Notice*, Report No. CL-95-71 (rel. Mar. 31, 1995).

<sup>3</sup> 47 C.F.R. §§ 22.99, 22.911(d), 22.912(d) and 22.949(b). See Smoky Hill Petition at 5-6; Badlands Cellular

should be dismissed as Petitioners failed to file Petitions to Deny against the GAP Applications, although GAP served copies of the respective applications on Petitioners.<sup>4</sup>

### III. DISCUSSION

3. Commission rule section 22.130<sup>5</sup> provides that petitions to deny any major filing must be filed within 30 days after the date of the Public Notice listing the major filing. Commission rule section 1.106(b)(1)<sup>6</sup> provides that in instances where a petition for reconsideration is filed by a person who is not a party to the proceeding, the filer shall show good reason why it was not possible to participate in the earlier stages of the proceeding. We find that Petitioners have not satisfied the Commission's requirement to show good cause why it was not possible to participate in the earlier stages of this proceeding.

4. Petitioners contend that they have demonstrated good cause to file petitions for reconsideration because the GAP Applications failed to reflect overlaps with Petitioners' CGSAs.<sup>7</sup> However, the GAP Applications were placed on Public Notice and Petitioners were served with copies. Petitioners have failed to demonstrate sufficient cause for their failure to file petitions to deny the GAP Applications. The Petitions are therefore fatally defective and are dismissed for failure to comply with Commission rule section 1.106(b).<sup>8</sup>

5. Notwithstanding our decision to dismiss the Petitions, we remind GAP of its responsibilities under former Commission Rule 22.903,<sup>9</sup> which was in effect at the time of the filing of the GAP Applications. Rule 22.903(d)(3)(i)<sup>10</sup> governs service area boundary extensions for unserved area systems and provides that the "service area boundaries of the cells must not extend into the CGSA of any other licensee's cellular system on the same frequency block or into any adjacent MSA or RSA on a frequency block for which the five year fill-in period has expired." Further, Commission rule section 22.903 (f)(2)(i)<sup>11</sup> provides that "cellular licensees must not begin to operate any facility that would produce a service area boundary extension into the existing CGSA of another operating cellular system on the same frequency

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Petition at 5-6.

<sup>4</sup> GAP's Oppositions to Petitions for Reconsideration, filed May 15, 1995, at 1.

<sup>5</sup> 47 C.F.R. § 22.130 (1994). Current rule section 1.939, 47 C.F.R. § 1.939, governs the filing of a Petition to Deny.

<sup>6</sup> 47 C.F.R. § 1.106(b)(1).

<sup>7</sup> Smokey Hill Petition at 2-3; Badlands Cellular Petition at 3-4.

<sup>8</sup> See, In re Application of Iowa RSA # 12 Limited Partnership, *Memorandum Opinion and Order*, 2 FCC Rcd 5306 (1991).

<sup>9</sup> 47 C.F.R. § 22.903 (1994). Section 22.903 was renumbered as rule section 22.911 and 22.912 in the Commission's Part 22 Rewrite Order. See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, 9 FCC Rcd 6513 (1994).

<sup>10</sup> 47 C.F.R. § 22.903 (d)(3)(i)(1994).

<sup>11</sup> 47 C.F.R. § 22.903 (f)(2)(i)(1994).

block without first obtaining the written consent of the licensee of that system.” Finally, we note that a condition specified on GAP’s authorizations provides that:

“any facility authorized herein with a service area boundary (SAB) extending into the CGSA of any other operating cellular system on the same channel block, regardless of when such other cellular system was/is authorized, is subject to the following condition: In the event that the licensee of the other cellular system requests that the SAB of the facilities authorized herein be removed from its CGSA, the licensee herein must reduce transmitting power or antenna height (or both) as necessary to remove the SAB from the CGSA, unless written consent from the licensee of the other cellular system, allowing the SAB extension, is obtained.”

We caution that a licensee’s failure to operate in accordance with the terms and conditions of its authorization in violation of Commission rules may result in appropriate enforcement action.

#### IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.331 and 1.106 of the Commission’s rules, 47 C.F.R. §§ 0.331, 1.106, the petitions for reconsideration filed by Badlands Cellular of North Dakota Limited Partnership and Smoky Hill Cellular of Colorado Limited Partnership on May 1, 1995, are hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze  
Deputy Chief, Commercial Wireless Division  
Wireless                      Telecommunications                      Bureau